In the United States Circuit Court of Appeals

For the Ninth Circuit

WILLIAM M. COLLINS, Plaintiff in Error, v. THE UNITED STATES OF AMERICA, Defendant in Error.	No. 3156.

Upon Writ of Error to the United States District Court for the Western District of Washington, Southern Division.

HONORABLE EDWARD E. CUSHMAN,
Judge.

BRIEF OF DEFENDANT IN ERROR.

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Met. Press

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STATEMENT.

The plaintiff in error was indicted by the grand jury at Tacoma, Washington, the indictment being returned and filed on January 9, 1918. (Tr. of Rec. pp. 2, 3); on January 14, 1918, the defendant appeared personally and by attorney, was duly arraigned and

entered a plea of NOT GUILTY, the case being thereupon set for trial for January 29, 1918, the Court directing that any motion challenging the sufficiency of the indictment be filed on or before January 18, 1918 (Tr. of Rec. pp. 5, 6); no objection to the sufficiency of the indictment was made within the time limited by the order but on January 28, 1918, the plaintiff in error filed a general demurrer in which it is stated that Counts 1 and 2 (taken together) of the indictment do not charge any offense or crime and do not state facts to constitute a crime (Tr. of Rec. p. 3).

On January 28, 1918, the Court overruled this general demurrer and required the Government to serve a bill of particulars. (Tr. of Rec. p. 4).

On December 19, 1917, the plaintiff in error had had a hearing before a United States Commissioner, at which time the witnesses for the Government were examined under oath; at the hearing on the demurrer on January 28, 1918, the Government advised the defendant that the indictment was based on the language and the acts of the plaintiff in error as testified to by said witnesses for the government at the said hearing before the U. S. Commissioner; within the time limited by order of the court so to do the Government served and filed its bill of particulars and the trial pro-

ceeded on January 31, 1918, without further objections of any kind being made by the plaintiff in error. (Tr. of Rec. p. 147; Tr. of Rec. p. 13).

Prior to the introduction of any evidence the plaintiff in error asked the court to instruct a verdict of NOT GUILTY for the reason that the indictment does not state facts upon which the plaintiff in error could be legally convicted. (Tr. of Rec. p. 14).

At the conclusion of the testimony of the government the plaintiff in error challenged the sufficiency of the evidence and asked the court to direct the jury to return a verdict of NOT GUILTY. (Tr. of Rec. p. 102).

At the conclusion of all the testimony and while the court was instructing the jury, plaintiff in error stated to the court that he had forgotten to renew his motion and that he would like to have the record show that he had neglected so to do. (Tr. of Rec. p. 137).

Whereupon, the court stated that the record would so show and overruled the motion and allowed an exception. (Tr. of Rec. p. 138).

Subsequent to verdict the plaintiff in error moved the court to grant a new trial upon the ground that the indictment does not charge any offense and that it is wholly insufficient in law. (Tr. of Rec. p. 9).

Subsequent to verdict the plaintiff in error moved in arrest of judgment upon the ground that the indictment is insufficient in law. (Tr. of Rec. p. 10).

There is no assignment of error based upon the alleged insufficiency of the bill of particulars.

There is no assignment of error based upon the action of the court in overruling the demurrer.

There is no assignment of error other than the general assignments numbered 2 and 5 (Tr. of Rec. p. 152), which point out any alleged error by the Court in receiving or rejecting evidence and in neither of these assignments does the plaintiff in error point out any of the evidence offered and objected to or offered and excluded.

At no point in the proceedings, either by demurrer, motion, argument, or requested instruction did the plaintiff in error point out to the trial Court any specific objection either to the insufficiency of the evidence or the insufficiency of the indictment.

The indictment consists of two counts, in both of which the language of the statute (Sec. 3, Title 1 of the Espionage Act, approved June 15, 1917—U. S. Compiled Statutes—Temp. Sup; 1917, p. 453) was followed.

At no place in the brief of the plaintiff in error does he point out to this Court any specific reason why the indictment or proof is insufficient.

In flagrant disregard of the rules of this Court and of every rule of procedure, plaintiff in error has filed as a bill of exceptions a transcript of extended notes of the stenographer and has failed to condense the same into the concise statement of fact required in the preparation of a bill of exceptions.

ARGUMENT.

As shown in our statement of the case, the plaintiff in error first entered a plea of not guilty following which his case was set for trial; he then filed a general demurrer without specifying any ground therefor; a bill of particulars was furnished to which no objection was made; at the argument on the demurrer, the plaintiff in error was advised as to what the evidence of the Government would be and throughout the trial the Court limited the Government to that evidence; at no time during the trial was specific objection made to the sufficiency of either indictment or proof.

In the case of *Sheridan vs. The United States* (236 Fed. 310) Judge Gilbert held

> "Unless objections to the form of an indictment are specifically pointed out by demurrer or

> are otherwise taken advantage of on the trial, it is too late, after verdict, to urge such objections, unless it is apparent to the Court that they affect the substantial rights of the accused."

In the same case the Court said, in determining the sufficiency of an indictment:

> "Few indictments under the national banking law are so skillfully drawn as to be beyond the hypercriticism of astute counsel—few which might not be made more definite by additional allegations. But the true test is, not whether it might possibly have been made more certain, but whether it contains every element of the offense intended to be charged, and sufficiently apprises the defendant of what he must be prepared to meet, and, in case any other proceedings are taken against him for a similar offense, whether the record shows with accuracy to what extent he may plead a former acquittal or conviction."

"If there were other details of which he desired to be informed, his remedy was to demand a bill of particulars (*Sheridan vs. United States,* 236 Fed., 311).

In the case at bar the indictment follows the language of the statute (Section 3, Title I of the Espionage Act) and states every ingredient of the offense. There was no opportunity for the plaintiff in error to be surprised at the introduction of any of the testimony offered at the trial by the Government because not only was a bill of particulars furnished, to which no objec-

tion was made, but the Government was bound by its statement made at the time the demurrer was argued that the evidence of the Government would consist of the evidence given before the United States Commissioner.

In the case of *Ledbetter vs. The United States* (170 U. S. 606;—42 L. ed. 1164) the Supreme Court held that where the statute sets forth every ingredient of the offense, an indictment in its very words is sufficient though that offense be more fully defined in some other section.

In *Rinker vs. the United States* (151 Fed. 759) the Court held

> "When an indictment sets forth the facts constituting the essential elements of the offense with such certainty that it cannot be pronounced ill upon motion to quash or demurrer, and yet is couched in such language that the accused is liable to be surprised by the production of evidence for which he is unprepared, he should, in advance of the trial, apply for a bill of particulars; otherwise it may properly be assumed against him that he is fully informed of the precise case which he must meet upon the trial. The defendant made no such application, but entered upon the trial without other objection than to demur to the indictment upon the ground that it 'does not state facts sufficient to constitute an offense against the laws of the United States'."

In support of this statement, the court refers to many adjudicated cases.

The case of *May vs. The United States* (199 Fed. 61) contains a complete summary of the law upon this subject; in that case the Court, while adopting as a general rule that a bill of particulars could not make an indictment valid which fails to state an essential element of the offense when objection is made at the proper time and in the proper manner, holds that the true test is whether or not it was probable that the accused could be surprised at the introduction of the Government evidence.

In the case of *Brown vs. The United States* (143 Fed. 63) the Circuit Court of Appeals for the Eighth Circuit held

> "It is also to be borne in mind that a defect in matter of substance is fatal, while a defect in matter of form only—and this includes the manner of stating a fact—which does not tend to the prejudice of the accused, is immaterial."

Measured by the above quoted long established rules, we submit

I.

That the indictment in this case is sufficient, and

II.

That at no place in the proceedings in the court below did the plaintiff in error challenge its sufficiency by any proper method which would permit the ruling of the court to be here reviewed.

In our opinion there are no other assignments of error entitled to consideration. We have carefully read the extended notes of the stenographer (labeled by the plaintiff in error as a Bill of Exceptions) from which it is clear that the proof tended to show that the plaintiff in error made false and untrue statements with the intent to interfere with the operation of the military forces of the United States and to promote the success of its enemies. Every question of fact was by the Court, under proper instructions, submitted to the jury.

It may be suggested by plaintiff in error that his assignment No. 7 is entitled to consideration although the rules of this Court have not been followed by him in preparing this assignment. A careful reading, however, of requested instructions numbered 1, 2, 3, and 5 (transcript of Record, pages 145 and 146) when considered with the instructions given by the Court, will clearly show that requested instructions numbered 2, 3, and 5 were substantially given and that requested instruction No. 1 should not have been given.

We respectfully submit that the judgment should be affirmed.

Respectfully,

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CLARENCE L. REAMES,
Special Assistant to the Attorney General,
Attorneys for the Defendant in Error.